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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 38

NEIBRO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,
Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No.

NEIBRO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,
Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

This is a petition for a writ of certiorari to the Second Circuit Court of Appeals to review its decision affirming the determination of the District Court for the Southern District of New York, setting aside service of process on Bethlehem Shipbuilding Corporation, Ltd. (hereinafter referred to as "Bethlehem") and dismissing this suit as against it.

Statement

Your petitioners, citizens of the State of New Jersey and residents of the District of New Jersey (R. 9), commenced this suit in the District Court of the United States

for the Southern District of New York against United Shipyards, Inc. and John E. Aldred, citizens of the State of New York and residents of the Southern District of New York (R. 9-11), the Chase National Bank, a national banking association having its principal office within the State of New York and the Southern District of New York (R. 10), and Joseph W. Powell, a citizen of the State of Massachusetts and a resident of the District of Massachusetts (R. 10), who has appeared generally herein. Your petitioners applied for an injunction to restrain United Shipyards, Inc., of which they are stockholders, from transferring substantially all its properties to Bethlehem (R. 1-2). A preliminary injunction was denied, and the transfer was consummated (R. 2). A supplemental bill (R. 9-46) was then filed by leave of the District Court (R. 6-8, 1-2), adding Bethlehem as a defendant and praying that Bethlehem be declared trustee for your petitioners of an interest in the property conveyed (R. 44), much of which is within the jurisdictional limits of the Southern District of New York (R. 16, 32, 35, 36, 43).

The declaration of a trust is sought by your petitioners on the basis of acts by Bethlehem in the Southern District of New York (R. 32-43, 55).

Bethlehem has its chief business office at #25 Broadway, New York City, within the Southern District of New York. In addition, that office in a factual sense is the corporate domicile of Bethlehem, since at that place and at no other place its Board of Directors meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept (R. 55).

In addition, Bethlehem has substantial property within the jurisdictional limits of the Southern District of New York in the form of drydocks in the waters of New York Harbour (R. 16, 32, 35, 36, 43).

Bethlehem is a corporation organized under the laws of Delaware (R. 64), but except technically, Bethlehem is not present in Delaware. Its office in Delaware is a nominal one, consisting of a listing with the Corporation Trust Company, and it has no plants or other property of a substantial and permanent nature in Delaware (R. 55).

Bethlehem has been qualified to do business in New York since 1918 (R. 56), its designated office in the State of New York being its headquarters at #25 Broadway, New York City, in the Southern District of New York (R. 81)..

Bethlehem's qualification and designation were effected under statutes which provided, and now provide,[1] that

(1) No corporation organized under the laws of another state shall do business in New York without being qualified.

(2) No such corporation shall be qualified to do business until it has designated an agent for service of process.

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[1]In 1918, when Bethlehem qualified and filed its designation, these provisions were contained respectively in N. Y. Gen. Corp. Law, §§ 15 and 16, and N. Y. Code of Civil Procedure, § 1780. As amplified and reenacted, they are now found in Gen. Corp. Law, §§ 210, 212, 218, 219, 223, 224, 225. Gen. Corp. Law, § 210 now provides that the designated agent shall be the New York Secretary of State, but § 213 continues the effectiveness of designations, like Bethlehem's, of a particular agent, filed prior to 1927. The relevant portions of former §§ 15 and 16 of Gen. Corp. Law and Code of Civil Procedure, § 1780, and present §§ 210, 213 and 225 of Gen. Corp. Law are printed in the appendix.

in all suits and proceedings against the corporation in New York.

(3) Suits may be maintained in the New York Courts by non-residents or by corporations organized under the laws of another state against foreign corporations where

(a) the cause of action arose in New York

or

(b) the defendant is doing business in New York.

The equity subpoena (R. 42) was served on Bethlehem within the Southern District of New York by delivering it personally to the designated agent (R. 77-79) at the designated office at #25 Broadway, New York City (R. 48).

Bethlehem appeared specially and moved to set aside service on it on the ground that the jurisdiction of the Court being based on diversity of citizenship, § 51 of the Judicial Code (U. S. Code, Tit. 28, § 112) conferred on it the privilege of objecting to the venue of the suit as having been laid neither in the District of Delaware, the district of which it is a resident, or the District of New Jersey, of which your petitioners are residents (R. 49-53).

The District Court granted Bethlehem's motion, setting aside the service of process on Bethlehem and dismissing the suit as against it (R. 4). The Circuit Court of Appeals affirmed.

The judgment is final because, in dismissing this suit as against Bethlehem, it finally disposes of your petitioners' cause of action as therein asserted for the declaration of a

trust in the property in Bethlehem's hands.[2] That cause of action was not asserted against any other defendant, and no other cause of action was asserted against Bethlehem.

Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Tit. 28, § 347).

The decree of the Circuit Court of Appeals was entered on April 19, 1939.

Questions Presented

1. Does a corporation organized under the laws of one state, by qualifying to do business in another state and designating an agent for the service of process pursuant to its statutes, consent to be sued in the local courts on causes of action over which such courts have jurisdiction under such statutes, and thereby waive the privilege conferred by § 51 of the Judicial Code against being sued in a district other than that of plaintiff's or defendant's residence, as to such causes of action, where maintainable in the local federal courts because of diversity of citizenship and the required amount in controversy?

2. Is a corporation incorporated under the laws of one state, in which it has no activities or property of a sub-

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[2] *Hill* v. *Chicago & Evanston Rd. Co.* (1891) 140 U. S. 52; *United States* v. *River Rouge Improvement Co.* (1926) 269 U. S. 411, 413-414; *Williams* v. *Morgan* (1884) 111 U. S. 684, 699.

stantial nature, a resident, within the meaning of § 51 of the Judicial Code, of a district in another state, within the jurisdictional limits of which district its main business headquarters, its registered office, its designated agent and a substantial part of its properties are located?

Reasons Relied On for Allowance of Writ

1. The decision below is in direct conflict with the decision of the Tenth Circuit Court of Appeals in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.* (1938) 100 F. (2d) 770, 774-775, that qualification to do business in a state and designation of an agent for service of process operate, as to a cause of action which the statutes of the state authorize to be maintained in the forum, as a waiver of the privilege conferred by § 51 of the Judicial Code against being sued by a non-resident.

This Court granted certiorari to review the *Oklahoma Packing Co.* case April 17, 1939 (# 750).

2. The decision below on that question appears to be in conflict with the decisions of this Court holding that:

> (a) Designation of an agent for service of process in suits in the local courts, exacted by a state in consideration of permission to do local business in the state, results in a consent to be sued on all causes of action of which the state courts have jurisdiction, and where the local federal courts have concurrent jurisdiction, the designation oper-

ates as a consent to be sued on such causes of action in those courts as well.

Ex parte Schollenberger (1877) 96 U. S. 369, 375-378.

(b) Such consent to be sued is a voluntary contract assenting to the terms of the applicable state statutes as construed by the state courts.

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining & Milling Co.* (1917) 243 U. S. 93, 95-96;

Mitchell Furniture Co. v. *Selden Breck Construction Co.* (1921) 257 U. S. 213, 215-216;

Louisville & Nashville Rd. Co. v. *Chatters* (1929) 279 U. S. 320, 329;

Morris & Co. v. *Skandinavia Ins. Co.* (1929) 279 U. S. 405, 408-409.

3. The Court below in holding that qualification and designation under the New York statute operates merely as a consent to service of process, not as a consent to be sued on all causes of action authorized by the New York statutes to be maintained in the local courts, has decided an important question of local law in conflict with the decision of the New York Court of Appeals in *Bagdon* v. *Philadelphia & Reading C. & I. Co.* (1916) 217 N. Y. 432, 436-437.

4. The decision below is in direct conflict with the decision of the Seventh Circuit Court of Appeals in *Dodge Manufacturing Co.* v. *Patten* (1932) 60 F. (2d) 676,

679-680, holding that a corporation factually present in a district in which it is qualified to do business and has a designated office, is a resident thereof within the meaning of § 51 of the Judicial Code, although incorporated in another state.

5. On these points, the Court below has decided important questions of federal law of general application which have not been, but should be, settled by this Court.

WHEREFORE it is respectfully submitted that the prayer of this petition should be granted.

Dated, New York, April 26, 1939.

NEIBRO COMPANY,
THE A. P. SMITH MANUFACTURING COMPANY,
DENIS F. O'BRIEN and
EMMA BOURKE,

Petitioners.

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

A statement of the grounds on which the jurisdiction of this Court is invoked, and a statement of the case, are contained respectively at page 5 and pages 1-5 of the petition, *supra*.

Statute Involved

Judicial Code, § 51 so far as material provides as follows:

> "* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Opinions Below

The opinion of the Circuit Court of Appeals by Clark, *C. J.* appears at pages 85-95 of the Record. It has not yet been printed in the reports. The memorandum decision of Caffey, *D. J.* appears at page 5 of the Record.

Argument

I

Bethlehem Has Waived the Venue Privilege.

1. § 51 of the Judicial Code does not limit the jurisdiction of the courts, but merely confers a personal privilege

on the defendant which he may assert or waive at his election.

Lee v. *Chesapeake & Ohio Railway Co.* (1922) 260 U. S. 653, 655,

and cases there collected.

2. In *Ex parte Schollenberger* (1877) 96 U. S. 369, this Court held that qualification and designation of an agent under the statutes of a state operated as a consent to be sued in the local courts on all causes of action within their jurisdiction, and was effective as to the local federal courts in cases within their concurrent jurisdiction.

The venue statute at that time[3] contained a provision, since repealed,[4] permitting a corporation to be sued where it was found, and the precise point there decided, that the corporation could be sued because it had consented to be found, is therefore not now applicable; but that circumstance does not affect the authority of the *Schollenberger* case as a determination of the underlying principle that qualification and designation is a consent to be sued in the local courts, equally operative in the local federal courts in cases within their concurrent jurisdiction.

3. The terms and extent of the consent to be sued depend upon the construction of the state statutes by the courts of the state.

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining & Milling Co.* (1917) 243 U. S. 93, 95-96;

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[3]Act of Mar. 3, 1875, c. 137, § 1, 18 Stat. 470.
[4]Act of Mar. 3, 1887, c. 373, § 1, 24 Stat. 552.

Mitchell Furniture Co. v. *Selden Breck Construction Co.* (1921) 257 U. S. 213, 215-216;

Louisville & Nashville Rd. Co. v. *Chatters* (1929) 279 U. S. 320, 329;

Morris & Co. v. *Skandinavia Insurance Co.* (1929) 279 U. S. 405, 408-409.

4. The New York Court of Appeals has determined that qualification and designation under the New York statutes is a consent to be sued on all causes of action which those statutes permit to be maintained against foreign corporations in the local courts.

Bagdon v. *Philadelphia & Reading C. & I. Co.* (1917) 217 N. Y. 432, 436-437.

5. The cause of action here asserted against Bethlehem is one which, under the New York statutes in force now and at all times since Bethlehem's qualification and designation, could be maintained against it in the local courts (statutes cited in petition, *supra*, pp. 3-4).

6. It follows that Bethlehem has consented to be sued in the local courts, state or federal, on this cause of action, and has waived the personal privilege conferred by § 51 of the Judicial Code against being sued thereon in a district in which neither party resides.

7. *Southern Pacific Co.* v. *Denton* (1892) 146 U. S. 202 does not hold the contrary of the foregoing propositions:

(a) The point actually decided in that case was that a state statute requiring a foreign corporation

as a condition of qualification to waive the right of removal to a federal court was unconstitutional. The observation in the opinion with respect to the effect of a supposed designation of an agent in Texas related to a statute which *had been declared unconstitutional by the Supreme Court of Texas* after commencement of the Denton suit, but *two years before that case reached this Court* (*Texas Land & Mortgage Co.* v. *Worsham* (1890) 76 Tex. 556, 13 S. W. 384).

(b) This Court stated the case to be governed by the rule regarding the extent to which a corporation may be sued locally which *has not* qualified and designated an agent for service of process (*Shaw* v. *Quincy Mining Co.* (1892) 145 U. S. 444), thus assuming that no greater liability to suit in the forum arises from qualification and designation, a point since decided to the contrary in

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining & Milling Co., supra.*

II

For Purposes of Venue Bethlehem Should Be Treated as a Resident of the Southern District of New York.

This Court has held that for purposes of venue a corporation is not a resident of a district outside of its state of incorporation merely by reason of doing business there (*Shaw* v. *Quincy Mining Co.* (1892) 145 U. S. 444, 453; *In re Keasbey & Mattison Co.* (1895) 160 U. S. 221, 229; *Macon Grocery Co.* v. *Atlantic Coast Line* (1909) 215

U. S. 501, 508; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1926) 270 U. S. 363, 366). This Court has never, unless in the dictum in the *Denton* case, *supra*, passed upon the effect of qualification and the designation of a local office and agent in a district containing its chief business and corporate headquarters, especially where, in the state of incorporation, the corporation has no real activities or property.

Since 1892, when the *Denton* case was decided, corporate development has presented the federal courts with the new problem of corporations such as Bethlehem, which arbitrarily pick a state for incorporation because affording maximum management control and minimum taxation and then proceed to set up business headquarters and transact their affairs at another place where their business actually is. Solely by legal tradition, they are there "foreign" corporations. They habitually sue in the federal courts, and remove suits against them, but when originally sued there, they use the old rule to harass the plaintiff and *prevent* suit against them *at their business headquarters.*

In determining whether suit in the courts of a state other than that in which it is incorporated would constitute a burden on interstate commerce this Court has referred to corporations as residents of "foreign" states in which they have offices and carry on their corporate functions. Thus in *Missouri ex rel St. Louis, Brownsville & Mexico Ry.* v. *Taylor* (1924) 266 U. S. 200, Mr. Justice Brandeis, writing for this Court, said in referring to a corporation organized under the laws of Delaware (p. 207):

> "* * * the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the state."

And in *International Milling Co.* v. *Columbia Co.* (1936) 292 U. S. 511, this Court, speaking through Mr. Justice Cardozo, while recognizing the rule of venue declared in the *Shaw* and *Seaboard* cases said (p. 519):

> "* * * the petitioner, though a Delaware corporation is suing in the state of its business activities. For many purposes, its domicile in law is in the state of its creation (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363), but it is living its life elsewhere. *In a very real and practical sense, it is a resident of the forum,* like the plaintiff in the *Taylor* case (266 U. S. 200, 207), who was *domiciled in one state and resided in another.*"[5]

Conclusion

A writ of certiorari should be granted as prayed in the petition.

Respectfully submitted,

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

[5]Emphasis added.

Appendix

Former Provisions

General Corporation Law

§ 15. "No foreign stock corporation * * * shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, * * *"

§ 16. "Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office * * * a statement under its corporate seal, * * * designating, in the manner prescribed in the Code of Civil Procedure, a person on whom process against the corporation may be served within the state. * * *"

Code of Civil Procedure

§ 1780. **When foreign corporation may be sued.** * * * An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to effect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this state.

Existing Provisions

General Corporation Law

§ 210. Authorization of foreign corporations, other than moneyed corporations, to do business within the state. A foreign corporation, other than a moneyed corporation, shall not do business in this state without having first obtained from the secretary of state a certificate of authority. To obtain such certificate, the corporation shall comply with the following conditions:

1. It shall present to the secretary of state a statement and designation in its corporate name, signed and acknowledged by its president, or a vice-president, or its secretary, treasurer, managing director or attorney in fact, which shall set forth the state or country of its incorporation, the place where its office within this state is to be located, the business which it proposes to do within this state, and a designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state.

* * * * * *

§ 213. Existing authority and designation continued. Every corporation which, at the time this section takes effect, has authority to do business in the state pursuant to a certificate heretofore granted by the secretary of state, shall continue to have such authority. The designation heretofore made by any such corporation of a person upon whom all process against it may be served within the state shall continue in full force and effect until the filing in the department of state of a written revocation by the corporation of such designation, or until the death, resignation or removal from the state of the person so designated, * * *.

§ 225. **Action against foreign corporation by another foreign corporation or non-resident.** An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevined within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

4. Where a foreign corporation is doing business within the state.

* * * * * *